No. 24-906

IN THE

Supreme Court of the United States

LEXINGTON INSURANCE COMPANY,

Petitioner,

v.

MARTIN A. MUELLER AND DOUG WELMAS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Under the rule and reasoning of *Whole Woman's Health v. Jackson,* 595 U.S. 30 (2021), does this Court lack subject matter jurisdiction to adjudicate Petitioner's *Ex parte Young*-based claims against Respondent tribal court judges because no Article III case or controversy exists between them.

(2) Whether, under the particular facts of this case, including the fact that Petitioner's agent did physically enter and conduct business on the Cabazon Indian Reservation, was the court of appeals correct in holding that the tribal court had adjudicative jurisdiction over the insurance coverage dispute between the Tribe and Petitioner under the first exception to *Montana v. United States*, 450 U.S. 544 (1981), which recognizes tribes may regulate nonmembers through consensual relationships.

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INTRODUCTION

In order to bolster its corporate profits, Petitioner Lexington Insurance Company made the conscious business decision to join a national insurance program, the sole and exclusive purpose of which was to insure American Indian tribes and their on-reservation property from on-reservation losses. Lexington's participation in this Indian tribal insurance program was facilitated by an insurance brokerage company—Alliant Insurance Services, Inc., doing business as "Tribal First"—that acted as Lexington's agent in securing tribal clients for Lexington. In keeping with the purpose of the tribal insurance program, over many years, Lexington repeatedly made the voluntary business decision to enter into insurance contracts with the Cabazon Band of Mission Indians (now called the Cabazon Band of Cahuilla Indians), a federally recognized Indian tribe. Under those contracts, Lexington agreed to insure certain tribal businesses and properties, all of which Lexington knew were located on the Cabazon Indian Reservation in Southern California. Under those contracts, Petitioner Lexington was the insurer and the Cabazon Band was the insured. When Lexington denied coverage for a claim that the Cabazon Band filed under one of those policies in 2020, the Tribe sued Lexington in the Cabazon Reservation Court, giving rise to the present litigation.

Lexington disputes the tribal court's jurisdiction to adjudicate that claim because, it asserts, none of its employees ever entered the Cabazon Reservation in connection with insuring tribal property. But the issue here is not that simple or clear-cut. In fact, the district court expressly found that the third party administrator Alliant was "Lexington's agent" and

that "its agent—Alliant—did conduct business on tribal land," Pet. App. 31a, significantly altering the basis for the Petition.

To even reach that issue, however, this Court would have to resolve a threshold question as to the federal courts' Article III jurisdiction to adjudicate this case at all. To challenge the Cabazon Reservation Court's assertion of jurisdiction, Lexington has sued two Reservation Court judges under *Ex parte Young,* 209 U.S. 123 (1908). But this Court held in *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021), that no case or controversy typically exists when an *Ex parte Young* action is brought against *state court* judges. Respondents contended below that reasoning necessarily extends to, and thus forecloses suit against, the Cabazon Reservation Court judges as well. As the question of Article III jurisdiction is one "the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998), the Court would need to address Article III jurisdiction before it considered the merits of Lexington's Petition.

Finally, it is worth noting that Lexington has been on notice of its possible susceptibility to tribal court jurisdiction since at least 2010, when Lexington was sued in tribal court by the Confederated Tribes of the Chehalis Reservation concerning coverage under a materially identical insurance policy. Respondent's Supplemental Appendix ("Resp. Supp. App.") 1a–8a (*The Confederated Tribes of the Chehalis Reservation v. Lexington Ins. Co.*, Case No. CHE-CIV-11/08-262 (Chehalis T. Ct. Apr. 21, 2010)). As a result of that litigation, Lexington surely recognized that it could avoid the possibility of becoming subject to tribal court

jurisdiction by simply amending its standard policy form to add a forum selection clause. That amendment could have required coverage disputes be litigated in Massachusetts, Lexington's home state, or it could have simply expressly excluded tribal courts from hearing disputes under the policy.[1] Had Lexington made this simple amendment to its standard policy more than a decade ago, it could have easily avoided any claim of tribal court jurisdiction by any of its tribal insurance clients. Instead, Lexington made the business decision not to so amend its policy form, thereby leaving it subject to the adjudication of claims in tribal courts.

STATEMENT OF THE CASE

This case concerns the first *Montana* exception, which acknowledges that tribes retain inherent jurisdiction over nonmembers who enter consensual relationships with tribes. The question at issue in this case is whether a tribal court has jurisdiction under *Montana* over a suit by a tribe against its insurance company for denying coverage under an all-risk policy for a loss sustained by the insured, tribally-owned business on trust land within its reservation.

For many years leading up to and including 2020, the Cabazon Band purchased property insurance policies from Respondent Lexington through a program called the Tribal Property Insurance Program. Pet. App. 9a; Resp. Supp. App. 10a (Joint Statement of Undisputed Facts and Genuine Disputes No. 14,

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[1] *See, e.g.*, *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 198 (7th Cir. 2015) (corporate bond purchaser included in its form contract a provision that disputes be resolved in "Wisconsin courts (federal or state) to the exclusion of any tribal courts") (emphasis removed).

("SOF"); *id.* at 27a (Declaration of Jonathan Rosser in Support of Defendants' Cross-Motion for Summary Judgment ("Rosser Decl.") ¶¶ 6, 7). Lexington knew that its policies insured Cabazon-owned businesses, including Fantasy Springs Resort Casino, located on trust lands within its Reservation. Pet. App. 14a. Indeed, annually, Lexington's agent Alliant would enter the Cabazon Reservation to obtain underwriting information for Lexington's policies. App. 31a; Resp. Supp. App. 20a (SOF No. 77). Lexington acknowledges it was the insurer and the Tribe was its insured under the policies. Pet. App. 13a.

In the spring of 2020, in the face of the COVID-19 pandemic, the Cabazon Band closed its on-Reservation businesses, including Fantasy Springs Casino. *Id.* at 12a. Asserting that the resulting loss of revenue was a covered loss under its business interruption policy, the Tribe filed a claim with Lexington, which Lexington denied. *Id.* The Tribe then filed suit in the Cabazon Reservation Court to challenge what it regarded as a bad faith denial of coverage. *Id.* Lexington challenged the Reservation Court's jurisdiction at the trial and appellate levels but after full briefing and oral arguments, both tribal courts, in carefully considered opinions, held that the Court had jurisdiction under the first *Montana* exception or, alternatively, under the Tribe's inherent right to exclude nonmembers from its Reservation. *Id.* at 12a–13a.

Having exhausted its tribal court remedies, Lexington filed a complaint in federal court against Respondents Martin A. Mueller and Doug Welmas, both sued in their official capacities as, respectively, trial judge and Chief Judge of the Reservation Court. *Id.* at 7a–8a, 19a. Lexington sought declaratory and

injunctive relief against Respondents under *Ex parte Young*, 209 U.S. 123 (1908), seeking to halt the Reservation Court's continued exercise of jurisdiction over the Cabazon Band's suit against its insurer. *Id.* at 2a–3a.

On the parties' cross-motions for summary judgment, the district court ruled in favor of Respondents. *Id.* at 33a. In the course of doing so, the district court first considered Respondents' argument that Lexington's case must be dismissed for lack of jurisdiction under the reasoning of *Whole Woman's Health*, which held that an *Ex parte Young* suit against state judges failed to satisfy Article III's case or controversy requirement. *Id.* at 20a–24a. Logically, Respondents argued, that reasoning must also extend to tribal court judges. In the same vein, Respondents argued that Lexington's complaint failed to state a claim for relief because, again under *Whole Woman's Health*, judges were not adverse parties to Lexington. Pet. App. 20a. The district court acknowledged that Respondents' "argument has merit," but felt compelled to reject it because Ninth Circuit precedent permitting *Ex parte Young* suits against tribal court judges was not "clearly irreconcilable" with *Whole Woman's Health*, which had dealt only with state court judges. *Id.* at 23a–24a.

Next, the district court considered—and granted—Respondents' motion to dismiss Lexington's suit against Chief Judge Welmas. *Id.* at 24a–26a. The district court agreed that "Chief Judge Welmas's general supervisory responsibilities over the Tribal Court are too attenuated from the enforcement of tribal jurisdiction to establish standing." *Id.* at 26a.

Finally, the district court held that the Cabazon Reservation Court had jurisdiction over the Tribe's

suit against Lexington based on the Tribe's sovereign right to exclude nonmembers from its Reservation. *Id.* at 28a–32a. Though Lexington, itself, had not physically entered the Reservation, "it surely conducted activity on tribal land" by insuring Cabazon-owned businesses there. *Id.* at 30a. Moreover, Lexington's insistence that physical entrance onto tribal lands was a necessary precondition for tribal court jurisdiction failed on its own terms because Lexington's agent had conducted business on Lexington's behalf on Cabazon's Reservation. *Id.* at 31a, 32a. Given these facts, the district court upheld the Reservation Court's exercise of jurisdiction, for "[t]o hold otherwise would allow parties to skirt tribal jurisdiction over activity occurring on tribal land through agency (as was the case here, since Alliant was Lexington's agent) or through virtual tools such as Zoom. Such a holding would degrade a tribe's inherent authority to manage its own affairs." *Id.* at 32a. Having upheld the Reservation Court's jurisdiction pursuant to the Tribe's sovereign right to exclude, the district court found no need to consider whether the court also had jurisdiction under the first *Montana* exception. *Id.* at 31a–32a.

The Ninth Circuit court of appeals affirmed. *Id.* at 5a. First addressing Respondents' *Whole Women's Health* argument, the panel acknowledged "[a]t first blush, it is not clear why this rationale"—that state court judges are not adverse to the parties whose cases they decide—"would not apply to tribal judges." *Id.* at 3a. Like the district court before it, however, the panel held that it was "bound by circuit precedent because [the precedent was] not 'clearly irreconcilable' with *Whole Woman's Health*." *Id*.

The panel below then addressed the question of tribal court jurisdiction, holding that the Ninth Circuit's recent decision in *Lexington Ins. Co. v. Smith*, 94 F.4th 870, *reh'g en banc denied,* 117 F.4th 1106 (9th Cir. 2024), squarely addressed and resolved the issue in the Cabazon Band's favor. *Id.* at 4a. Relying on this Court's pronouncement in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) that "a tribe has regulatory jurisdiction over a nonmember who 'enters tribal lands or conducts business with the tribe,'" *Smith* "easily conclude[d] that Lexington's business relationship with the [Suquamish] Tribe satisfies the requirements for conduct occurring on tribal land, thereby occurring within the boundaries of the reservation and triggering the presumption of jurisdiction." *Id.* at 5a (quoting *Smith*, 94 F.4th at 882 (quoting *Merrion*, 455 U.S. at 142)). *Smith* had further concluded that "Lexington's insurance contract with the [Suquamish] Tribe squarely satisfie[d] [the] consensual-relationship exception"—*i.e.*, the first exception—under *Montana*. *Id*. (quoting *Smith,* 94 F.4th at 883–84). As all the facts material to the outcome in *Smith* were present in the case at bar, the panel below upheld the Cabazon Reservation Court's exercise of jurisdiction over Lexington under *Montana*. *Id*.

REASONS FOR DENYING THE PETITION

I. This Case Presents a Novel and Previously Unlitigated Question as to the Federal Courts' Article III Jurisdiction That This Court Would Have to Resolve Before Reaching the Question Presented in Lexington's Petition.

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes . . . . The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co.*, 523 U.S. at 94 (internal citations and quotation marks omitted). Lexington's suit against Respondents presents a novel, threshold question as to the federal courts' Article III jurisdiction over this case that this Court must resolve before it can reach Lexington's Question Presented.

In *Whole Woman's Health*, 595 U.S. 30 (2021), this Court dismissed *Ex parte Young*-based claims against a state court judge and clerk. This Court admonished that *Ex parte Young's* "narrow exception" to the doctrine of state sovereign immunity "does not normally permit federal courts to issue injunctions against state court judges or clerks." *Id*. at 532. Moreover, this Court held that suits against state judges fail to create the requisite case or controversy under Article III because of a lack of adversity between the parties:

> Judges exist to resolve controversies about a law's meaning or its conformance to the

> Federal and State constitutions, not to wage battle as contestants in the parties' litigation
>
> [and therefore]
>
> no case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.

Id. at 40 (internal citation and quotation marks omitted).

In both federal courts below, the Respondents argued that the rule and reasoning of *Whole Woman's Health* applies to Petitioner's *Ex parte Young* suits against tribal court judges, thereby barring Lexington's suit against those defendants for lack of jurisdiction.

Both the district court and the Ninth Circuit found some merit in Respondent's argument. The district court described it as "a powerful argument," Pet. App. 22a, that "has merit," *id.* at 23a, while the court of appeals noted that "[a]dmittedly, there is some tension between *Whole Woman's Health* and our precedents allowing tribal judges to be sued under *Ex parte Young*," *id.* at 2a, and "[a]t first blush, it is not clear why this rationale would not apply to tribal judges." *Id.* at 3a.

The rationale for analogizing state and tribal court judges is, in fact, powerful. Indian tribes, like states, are governments, *Lac du Flambeau Band v. Coughlin*, 599 U.S. 382, 392–93 (2023), and tribal courts, like state courts, are creatures of those governments. As this Court has noted, "[t]ribal courts play a vital role in tribal self-government and the Federal government has consistently encouraged their development." *Iowa*

Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14–15 (1987) (citation omitted). Congress did so explicitly in the Indian Tribal Justice Support Act of 2009 where it stated that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring . . . the political integrity of tribal governments." 25 U.S.C. § 3601(5). In this sense then, tribal courts and state courts are largely indistinguishable in their roles and responsibilities and, as the district court correctly noted, "as tribal courts are the judicial instruments of a sovereign entity, there are substantial similarities between tribal courts and state courts." Pet. App. 23a.

Tribal court judges also perform the same functions and exercise many of the same authorities as their state counterparts. Both neutrally interpret and apply the laws relevant to a dispute and decide cases as presented to them. And because tribal court judges perform the same judicial functions as other judges, tribal court judges are entitled to the same form of judicial immunity as any other judge. *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 915 (9th Cir. 2021) ("[A] tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges."), *cert. denied*, 142 U.S. 2836 (2022); *see also* William C. Canby Jr., *American Indian Law in a Nutshell* 77 (9th ed. 2020) (same).

Given these facts, the courts below had ample justification for finding that the rule and reasoning of *Whole Woman's Health* should be applied to tribal courts and tribal court judges such as the Respondents here. But, in the end, both courts began and ended their analyses of this question by simply holding that they were bound by prior Ninth Circuit precedent.

In the last twenty-five years, the Ninth Circuit has issued several rulings that allowed *Ex parte Young*-based claims to be brought against tribal court judges, but did so without any analysis of the jurisdictional basis for those rulings. *See, e.g.*, *Salt River Project Agr. Imp. & Power Dist. v. Lee,* 672 F.3d 1176, 1177–78 (9th Cir. 2012) (lawsuit for prospective injunctive relief could proceed against tribal "officials," which included tribal judges and executive officials, through "routine application" of *Ex parte Young* and without any analysis as to why judges and executive officials were treated the same); *BNSF Ry. Co. v. Ray*, 297 F. App'x 675, 676 (9th Cir. 2008) (mem.) (designating, without analysis, tribal judge as a "tribal officer" under *Ex parte Young*); *Big Horn Cty. Electric Coop v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (permitting *Ex parte Young* action against tribal executive officials and judges, describing such defendants as "tribal officers under the *Ex [p]arte Young* framework").

Whole Woman's Health expressly rejected the idea that judges are the equivalent of executive officials for *Ex parte Young* purposes because judges do not enforce laws as executive officials might; judges instead work to resolve disputes between parties, 595 U.S. at 39. But neither of the courts below incorporated this reasoning into their analyses of the issue. Instead, they simply held that because *Whole Woman's Health* did not mention tribal court judges, they were bound by the recent Ninth Circuit decisions. Pet. App. 3a, 24a. They did so on the basis of *Miller v. Gammie*, which had held that lower courts were bound by existing circuit precedents unless "intervening Supreme Court authority is clearly irreconcilable with [their] prior circuit authority." 335 F.3d 889, 900 (9th Cir. 2003).

The problem with this rather shallow analysis is that it failed to apply the relevant law on this issue. It is axiomatic that cases are not authority for propositions not considered therein. *United States v. Tucker Truck Lines*, 344 U.S. 33, 38 (1952) (case not precedent for questions not discussed in the Court's opinion). This is even more important when the undecided issue involves a question of jurisdiction. As this Court clearly stated in *Pennhurst State School & Hospital v. Halderman*:

> [W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, [the] Court [is not] bound when a subsequent case finally brings the jurisdictional issue [to the forefront].

465 U.S. 89, 119 (1984) (citation omitted).

And that, of course, is exactly the situation presented here. Earlier cases in the Ninth Circuit have allowed adjudication of *Ex parte Young* actions against tribal court judges. But they did so without considering or addressing the specific jurisdictional issue raised here: whether an Article III case or controversy exists in such circumstances. In light of *Whole Woman's Health*, that specific jurisdictional issue is squarely presented in this case for the first time and this Court would need to address it before considering the merits of the Petition. But because no other circuit court or state court of last resort has decided the question, it would be premature to do so here and the Petition should therefore be denied.

II. Lexington's Petition Omits One Salient Fact: Petitioner's Agent Did Conduct Business on the Cabazon Reservation.

The Petition in this matter seeks to raise the issue of whether a tribal court has jurisdiction over a non-Indian "who never set foot on the reservation." Pet. at 8. How can a tribal court assert jurisdiction over a non-member who "never physically entered the reservation," *id.* at 3, the Petitioner asks. An interesting question, but not exactly the one presented here.

In fact, the district court expressly found that Alliant Insurance Services, Inc. was "Lexington's agent" and that "its agent—Alliant—did conduct business on tribal land." Pet. App. 31a; *id.* at 32a. These findings are neither surprising nor subject to dispute. Lexington acknowledges that:

> Alliant handles the entire process, providing quotes to tribes, preparing policies consistent with insurers' underwriting guidelines, collecting premiums, and maintaining policy-related documents.

Pet. at 3. With respect to the specific Cabazon policies at issue in this case, Lexington further acknowledges that Alliant prepared those policies for Lexington. *Id*. Moreover, the uncontroverted Statement of Undisputed Facts considered by the district court noted that

> [a]nnually over the last decade, an Alliant employee would visit the Cabazon Reservation to meet with Tribal employees to gather information relevant to the renewal of the Tribe's policies with Lexington.

Resp. Supp. App. 20a (SOF No. 77); *see also id.* at 28a (Rosser Decl. ¶7).

Lexington's Petition omits any mention of this very significant fact. As a result, the Petition in this matter does not present the clear-cut issue that it asks this Court to address and the Court should therefore deny the Petition.

III. The Ninth Circuit Decisions Neither Create Nor Deepen Any Circuit Split.

Petitioner contends that the decision below, and the decision upon which it was grounded—*Smith*—have created a circuit split with respect to the "off-reservation conduct" issue, Pet. at 8–9, and deepened an existing circuit split involving the proper scope of this Court's ruling in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). Pet. at 9–10. Neither contention is correct. A review of the cases cited in the Petition merely demonstrate the fact-specific nature of the analysis courts use in applying *Montana* and its exceptions. Moreover, the *Plains Commerce Bank* issue is not even properly presented by the Petition.

A. The Cases That Petitioner Claims Create A Circuit Split Are Readily Distinguishable From The Case At Bar.

Lexington claims that the Ninth Circuit created a circuit split in this case by extending the first *Montana* exception for tribal jurisdiction to nonmembers who never set foot on the reservation. Pet. at 8 (citing *Montana*, 450 U.S. at 565). As support, Lexington cites three federal court of appeals decisions and two state supreme court decisions purportedly at odds with the Ninth Circuit's decision upholding jurisdiction here. *Id.* (citing *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207–08 (7th Cir. 2015);

MacArthur v. San Juan County, 497 F.3d 1057, 1071–72 (10th Cir. 2007); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998); *State v. Eriksen*, 259 P.3d 1079, 1083 (Wash. 2011); *In re J.D.M.C.*, 739 N.W.2d 796, 810–11 (S.D. 2007)). Yet none of these cases create a split with the Ninth Circuit's decisions here.

The first case Lexington alleges creates a circuit split with the Ninth Circuit is *Stifel*, a Seventh Circuit decision. *Stifel* arose out of a sale of bonds by a Wisconsin-based tribal corporation to finance its off-reservation commercial ventures in Mississippi. 807 F.3d at 189. Following a protracted dispute over the validity of the bonds, the tribal corporation instituted a tribal court suit against various non-tribal bondholders, seeking a declaration that the bonds were invalid; the non-tribal entities, including the initial bond purchaser Stifel, in turn, challenged the tribe's jurisdiction in federal court. *Id.* at 191–92. The district court ruled in favor of the non-tribal entities, holding that the tribal court lacked jurisdiction. *Id.* at 192–93.

The Seventh Circuit affirmed for two independent reasons. First, the court of appeals ruled against tribal court jurisdiction because the bond contract's forum selection clause vested jurisdiction over all bond-related disputes in "Wisconsin courts (federal or state) to the exclusion of any tribal courts." *Id.* at 198 (emphasis removed). Second, the court held that the tribe lacked jurisdiction under *Montana's* first exception because the tribe did "not seek to regulate any of Stifel's activities on the reservation." *Id.* at 208. Stifel's on-reservation activities were alleged to have been misrepresentations of material terms in the bond transaction, whereas the tribal court action sought to void the bond documents for their noncompliance

with federal gaming and tribal laws. *Id.* at 208. In short, the court found no nexus to the nonmember's consensual conduct. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) ("*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself."). As a result, the Ninth Circuit, observed that the conduct in *Stifel*, "could not even plausibly be viewed as connected to tribal land." *Smith*, 94 F.4th at 882 (citing *Stifel*, 807 F.3d at 189, 207–08).

Here, by contrast, the Ninth Circuit found it "no mystery" that a nexus existed in this case. *Smith*, 94 F.4th at 884; Pet. App. 5a.

The Cabazon Band's tribal court suit has a clear nexus to the conduct sought to be regulated—Lexington's denial of coverage under a policy that is directly connected to tribal land in that it insures tribally-owned property on tribal trust land for losses occurring on-reservation. Pet. App. at 13a–14a, 31a, 37a; *see also Smith*, 94 F.4th at 884. Furthermore, unlike the contract in *Stifel* that required litigation exclusively in Wisconsin courts, Lexington's insurance policy contains no forum selection clause requiring either party to litigate coverage disputes in any specific court; rather, disputes may be brought in any court of competent jurisdiction. Pet. App. at 10a–11a. Simply put, the different outcomes in *Stifel* and *Smith* are driven by disparate facts, not disparate reasoning.

The same is true of *Smith's* supposed conflict with the Tenth Circuit decision in *MacArthur*. Indeed, *MacArthur's* facts are so readily distinguishable as to deprive it of any relevance to the case at bar. *MacArthur* involved a tribal court lawsuit brought by members and nonmembers of the Navajo Nation

against the San Juan Health Services District ("District"), a political subdivision of the State of Utah, which operated a health clinic on non-Indian fee land owned by the State of Utah within the Navajo Nation. 497 F.3d at 1060–61. Plaintiffs alleged discrimination and other violations arising out of their employment at the District's clinic. The tribal court issued injunctive relief in favor of the plaintiffs, who sought to enforce the tribal court's orders in federal district court. *Id.* at 1063. The federal district court held that the Navajo Nation had regulatory and adjudicatory jurisdiction over the tribal members' claims against the District under the first *Montana* exception. *Id.* at 1064.

On appeal, the Tenth Circuit rejected that conclusion, holding that the first *Montana* exception contemplates tribal jurisdiction over "private individuals or entities who voluntarily submit themselves to tribal jurisdiction" through consensual relationships. *MacArthur*, 497 F.3d at 1073. Navajo could not, however, "exercise regulatory authority over another independent sovereign [(the District)] on that sovereign's land" involving "employment relationships . . . entered into exclusively in [the District's] governmental capacity." *Id*. at 1073 & 1074. *MacArthur* bears no resemblance to the Cabazon Band's dispute with Lexington, which involves a contract between a tribe and a private party—Lexington—that has consented to insuring tribally owned property on tribal trust land within the tribe's reservation. Pet. App. 13a–14a, 31a, 37a.

Lexington next asserts the Ninth Circuit decision here creates a split with the Eighth Circuit's decision in *Hornell*. *Hornell*, however, is legally and factually distinguishable from this case. In *Hornell*, the estate

of the deceased Crazy Horse, a revered leader of the Lakota Sioux people who opposed the use of alcohol, brought suit in the Rosebud Sioux tribal court against breweries, challenging their unauthorized use of Crazy Horse's name in manufacturing, selling, and distributing an alcoholic beverage called Crazy Horse Malt Liquor. 133 F.3d at 1088–89. The estate brought various state and federal law claims based on the misuse of Crazy Horse's name and likeness. *Id.* at 1089. Citing *Montana's* rule that tribes retain inherent sovereign power over the conduct of non-Indians on their reservations, the Eighth Circuit held that the conduct at issue was the breweries' manufacture, sale, and distribution of Crazy Horse Malt Liquor, which undisputedly did not occur on the Rosebud reservation. *Id.* at 1091. Nor did the breweries have any contract with the tribe or any tribal members.

Hornell is factually distinguishable from this case as Lexington both had a contract with the Cabazon Band and insured property physically located on the Band's reservation for losses occurring on-reservation. Moreover, Lexington's agent had physically entered the Cabazon Band's reservation to obtain information relevant to Lexington's underwriting of the Tribe's policies. Pet. App. 31a; Resp. Supp. App. 20a (SOF No. 77).

Hornell is also distinguishable by the fact that no party in that case asserted *Montana's* consensual relationship exception. *Id.* at 1093. Rather, the parties' argued whether jurisdiction was proper under *Montana's* second exception for regulation of non-Indian conduct that threatens or has some direct effect on the health or welfare of the tribe. *Id. Montana's* second exception is not at issue here, only the first exception is. Pet. App. 5a.

Lexington further argues—again, incorrectly—that the Ninth Circuit's decision here conflicts with *J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007). However, as with the federal court decisions, *J.D.M.C.* is readily distinguishable from this case. *J.D.M.C.* is a family law Indian Child Welfare Act case involving an Indian child's tribal member mother and a non-Indian father. The South Dakota Supreme Court held that the tribal court lacked *personal* jurisdiction over the father because he lacked minimum contacts with the tribe. *J.D.M.C.*, 739 N.W.2d at 812–13. Personal jurisdiction is not at issue in this case; *subject matter* jurisdiction is. Thus, while *J.D.M.C*. discussed *Montana's* consensual relationship exception, the discussion is *dicta* given the fact that there was no ruling on subject matter jurisdiction. *Id.* at 809.

Finally, the Washington Supreme Court's decision in *State v. Eriksen* does not create any "split" as Lexington alleges. 259 P.3d 1079 (Wash. 2011). Aside from its status as a state court decision, *Eriksen's* facts diverge sharply from the case at hand. *Eriksen* involves a criminal misdemeanor prosecution of a non-Indian charged with driving under the influence. *Id.* at 1080. The question presented there was whether tribal police, who had observed the defendant commit obvious traffic violations on-reservation, had authority to follow her outside of the reservation to stop and detain her until county police arrived. *Id.* at 1079–80. The court held tribal police had no such authority for two reasons. *Id.* First, the tribe's treaty did not explicitly grant the tribe the right to regulate or enforce traffic laws beyond reservation borders. *Id.* at 1082. Next, *Montana's* second exception, which allows regulation of nonmember conduct that threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe, did

not provide a source of tribal authority to stop and detain the defendant off-reservation. *Id.* at 1083.

In contrast to the case at bar, *Eriksen* involved the assertion of authority over a nonmember having no consensual relationship with the Tribe; it was analyzed under the second *Montana* exception, not the first. In short, *Eriksen* provides no reason to grant Lexington's petition.

In sum, then, the cases Petitioner cites do not establish a circuit split warranting this Court's review.

B. Even if the *Plains Commerce Bank* Issue Were Properly Presented, the Case At Bar Is Entirely Consistent With *Plains Commerce Bank*.

Petitioner argues that the Court should resolve a purported circuit split over the correct interpretation of the Court's decision in *Plains Commerce Bank*. Pet. at 9–10. This issue, however, is not properly preserved for review because it was not included as an express question presented. Sup. Ct. Rule 14.1(a). Under Rule 14.1(a), it is not enough to mention a point in a party's Argument (Pet. at 9); an actual question must be presented. Nor is the *Plains Commerce Bank* issue a "subsidiary question fairly included" in the single question actually presented. This Court should not excuse Petitioner's failure to comply with this Court's Rules or grant review of an issue Petitioner felt insufficiently important to include as an official question. In any event, because the facts of this case satisfy Petitioner's own standard, this is not the appropriate case for that review.

Petitioner contends that *Plains Commerce Bank* added an additional requirement for the application of *Montana*'s first exception: that the conduct of the non-Indian must implicate a "sovereign interest" of the Tribe. *Id.* While the Ninth and Seventh Circuits have seemingly taken divergent positions on this issue, the facts of this case, involving the ability of the Cabazon Band to raise and protect critical tribal revenues, plainly involves a sovereign governmental interest of the Tribe.

The Cabazon Band brought its action against Lexington in tribal court after the insurer denied the Tribe's claim under its business interruption insurance policy. In the spring of 2020, in response to the COVID-19 pandemic, the Tribe had closed its on-Reservation casino for several months. As a result, the Tribe had lost millions of dollars in tribal revenues. Resp. Supp. App. 28a (Rosser Decl. ¶ 8). And those casino revenues were "vital sources used to support the Tribe's essential services to tribal members and persons visiting and doing business on the Reservation." *Id.* at 27a (Rosser Decl. ¶5).

Raising and protecting tribal revenues to provide essential governmental services is a quintessential sovereign interest. As this Court noted years ago, when the Cabazon Band was fighting to establish its gaming business, the "overriding goal" of federal Indian policy is to "encourag[e] tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). The Court then went on to affirm the Cabazon Band's right to operate gaming activities on its Reservation, holding that "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."

Id. at 219; *see also Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (recognizing that "tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions" because "tribal business operations are critical to the goals of tribal self-sufficiency"); *Merrion*, 455 U.S. at 137 (recognizing the power to tax as "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government . . . that enables a tribal government to raise revenues for it essential services").

The Ninth Circuit, whose opinion the Court affirmed in *Cabazon*, was even more explicit on this point. In describing the need for the Cabazon Band and other tribes to raise tribal revenues through gaming, the Court noted that "[t]he Tribes in this case are engaged in the *traditional governmental function* of raising revenue. They are thereby exercising *inherent sovereign governmental authority*." *Cabazon Band of Mission Indians v. County of Riverside,* 783 F.2d 900, 906 (9th Cir. 1986) (emphasis added).[2]

Lexington argues here that the Court needs to grant certiorari to determine whether the application of *Montana*'s first exception requires the implication of a sovereign tribal interest. But this case, involving the ability of the Cabazon Band to generate and protect essential tribal revenues, clearly meets this test,

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[2] These sovereign tribal interests were later codified by Congress in the Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq. In that Act, Congress found that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency and strong tribal governments," *id.* at 2701 (4), and that among the purposes of the Act was "to protect such gaming as a means of generating tribal revenue." *Id.* at 2702 (3).

whether required or not. As a result, this case is not the appropriate one to address that question and the Petition should be denied on that ground.

CONCLUSION

In other cases, the Court has expressed concerns about unknowing parties inadvertently making themselves subject to tribal court jurisdiction through the vagaries of where a traffic accident occurred, *Strate v. A-1 Contractors*, 520 U. S. 438, 457 (1997), or through the off-reservation purchase of non-Indian fee land by a non-Indian purchaser, *Plains Commerce Bank*, or by hunting on privately owned land that happened to be located within the exterior boundaries of a large Indian reservation, *Montana*, 450 U.S. at 557–67. This is not such a case. Here, a large, sophisticated corporation sought to profit by participating in a national insurance program *the sole and exclusive purpose of which was to enter into contracts with Indian tribes to insure tribal property located on tribal reservations*. Moreover, the Petitioner was made aware, more than a decade ago, that these activities could subject it to tribal court jurisdiction and that it could eliminate this possibility by a simple amendment to its standard form tribal insurance policy, *but chose not to do so*. To the extent that Petitioner now complains about the situation in which it finds itself, it is a situation entirely of its own making and does not warrant intervention by this Court.

Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 15, 2025

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX
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APPENDIX A

IN THE CHEHALIS TRIBAL COURT
CHEHALIS INDIAN RESERVATION
OAKVILLE WASHINGTON

Case No.: CHE-CIV-11/08-262

THE CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, DBA LUCKY EAGLE CASINO,

Plaintiff,

vs.

LEXINGTON INSURANCE CO.,

Defendant.

Hon. Ron J. Whitener

ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

I. FACTS AND PROCEDURAL HISTORY

This matter concerns an insurance policy coverage disagreement between the Confederated Tribes of the Chehalis Reservation d/b/a Lucky Eagle Casino (hereinafter "Tribe") and Lexington Insurance Company (hereinafter "Lexington"). The policy was entered into on July 1, 2007 between the Tribe, federally recognized by the United States as a sovereign government, and Lexington, a non-Indian private insurer. The policy was negotiated through the use of an insurance broker, namely Driver Alliant. Lexington

confirmed that they were aware they were entering into an agreement with an Indian tribe when the policy was issued. The policy did not contain a choice of law, forum selection, or mandatory arbitration clause. The only stipulation was that any disputes needed to be brought under a competent court of the United States.

In December 2007, severe weather caused the roads leading to and from the Lucky Eagle Casino to be inaccessible for a period of time. The Casino filed a claim for loss of business as a result of the road closures pursuant to the business interruption insurance coverage under Lexington's extended coverage policy retained by the Tribe.

Lexington paid the undisputed amount due under the policy, however, the parties' disagreement hinges on whether additional money is owed to the Tribe for loss of business. The Tribe filed a claim in the Chehalis Tribal Court to which Lexington responded with a motion to dismiss for lack of jurisdiction.

II. DISCUSSION

A. The Exhaustion and Comity Standards

The exhaustion doctrine allows "a tribal court to determine in the first instance whether it has the power to exercise subject-matter jurisdiction" over a dispute. *Stack West Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992). Generally any case between a non-Indian and a sovereign tribe triggers a federal question, thus concurrent jurisdiction with the federal courts would exist. Federal courts do not act on their concurrent jurisdiction because civil jurisdiction should lie with the tribal courts unless the claim is "affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Ins. Co. v. LaPlante*,

480 U.S. 9, 18 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987). Exhaustion in the tribal court is required as a matter of comity, not as a jurisdictional prerequisite. *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 16 n.8, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987). Instances where comity has been flatly denied are limited to situations where the tribal court lacks personal or subject matter jurisdiction, or when the tribal court has denied the losing party due process of law. *Wilson v. Marchington,* 127 F.3d 805, 810 (9th Cir. 1997). The Ninth Circuit has adopted comity as the applicable standard and repeatedly has affirmed the ability of tribal courts to make their own determinations regarding the existence of tribal jurisdiction and the merits before even hearing the case. *Id.* at 809-10. Furthermore, complete exhaustion requires the parties to wait until the tribal appeals court, if it exists, has had an opportunity to rule on the matter.

In this particular matter, the Chehalis Tribal Court should be allowed to first determine whether or not the Tribe has valid personal and subject matter jurisdiction. If the Court does determine that tribal jurisdiction exists, then the Court may next rule on the merits of the case. Thus, this Court does have the authority to decide whether or not this dispute should proceed within its jurisdiction.

B. Tribal Court Jurisdiction over Defendant Lexington.

The general rules for tribal jurisdiction in civil matters state that tribes do not retain jurisdiction over non-members unless the interaction fits within at least one of the *Montana v. United States*, 450 U.S. 544, (1981) exceptions. The first exception allows a tribe to regulate non-members "who enter consensual relationships with the tribe or its members, through

commercial dealing, contracts, leases, or other arrangements." *Id.* 565. The second exception grants civil authority "over the conduct of non-Indians on fee lands within the reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* 565-566.

Generally, a tribe does not retain jurisdiction under the second exception unless it can prove that the inability to hear the case would imperil the tribe. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 432 (1989). This court does not find the second exception to be particularly applicable to this case and thus will not discuss its merits in depth. The Tribe did make the argument that revenue from the casino is used for necessary tribal services to its membership, however, the loss of profits from road closures spanning only a few days does not likely meet the *Brendale* standard.

The first exception, coined the consensual relationship test, is the appropriate test to apply in this matter. Federal courts have viewed the *Montana* test as adequate means for protecting non-member defendants from being dragged into a "strange court" while adhering to the "traditional notions of fair play and substantial justice" required under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and "fair warning" of being subject to a foreign jurisdiction held in *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The non-member party needs to voluntarily and purposefully enter into an agreement with the tribe that logically opens them up to tribal jurisdiction.

Lexington argues in its motion to dismiss that much of the direct contact with the Tribe was done

through third party brokers. However, it was made clear through directed questioning by the Court that Lexington knew they were issuing an insurance policy to the Lucky Eagle Casino which they also knew to be owned and operated by sovereign Indian tribe. The fact that Lexington was aware they were entering into an agreement with a federally-recognized tribe satisfies the voluntary and purposeful requirements to overcome any argument that it would violate notions of fair play to allow this Court to hear this matter. Lexington has a signed document outlining the terms of their agreement, billed the Tribe, accepted payments from the Tribe, received a claim from the Tribe, referred the claim to an adjuster, and paid the undisputed amount due under the policy. This activity is all consistent with an insurance company who is acting under and acknowledging a legally binding contract.

Furthermore, the consensual relationship test also mandates that the Tribe afford the nonmember defendant sufficient due process by satisfying a specific form of subject matter and personal jurisdiction. The decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) has made it a requirement that subject matter jurisdiction over a non-member must also be the source of the tribe's personal jurisdiction. *Strate* requires a tribe to demonstrate that the nonmember has not only voluntarily availed themselves to tribal court jurisdiction but availed themselves to tribal court jurisdiction for the specific issue asserted in the claim. In *Strate*, a man working under a construction contract for a tribe, was involved in a car accident within the boundaries of the reservation. The United States Supreme Court determined that the accident was unrelated to his business relationship with tribe. Even though the

accident occurred within the bounds of the reservation the Court held that the tribe did not have jurisdiction to hear this case because the accident was not sufficiently linked to the construction contract.

The Supreme court has stated that "civil jurisdiction over the activities of non-Indians on reservations lands presumptively lies in tribal courts." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987). The relevant question in our case becomes; does an insurance policy by a non-Indian company covering a tribal building on tribal *land* fall within this presumption? *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999) helps to clarify how an insurance contract offered by a non-member insurance company covering tribal property does equate to non-Indian activity on tribal lands. *Allstate Indem. Co.* involved a car accident on tribal lands. Allstate argued that since the lawsuit involved a bad faith settlement claim, the location of the dispute should be the off-reservation insurance offices and not the location of the accident which occurred on a tribal road. The 9th Circuit looked to the Supreme Court's holding in *Iowa Mut. Ins, Co. v. LaPlante*, 480 U.S. 9, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987), to settle this question since the facts of the cases were so similar. Both opinions share the reasoning that the location of the harm occurred on tribal lands and that administrative and settlement activities occurring off the reservation did not diminish tribal jurisdiction.

However, in Allstate *Indem. Co.* additional facts were utilized to dismiss tribal jurisdiction. *Allstate Indem Co.* was an auto insurance case where a non-member insurance party bad insured a tribal mem-

ber. The insured was involved in an accident that "occurred on the early morning hours of April 1" and the insurance company stated that the insured's "policy had expired on midnight on March 31." *Allstate Indent Co. v. Stump*, 191 F.3d 1071, 1071. The reason why the 9th Circuit ultimately determined that the bad faith claim did not arise from a contractual relationship was because the policy had expired and this case was now between an insurance company and a third party. Additionally, the Court reasoned that since the policy ended on March 31st this also ended the non-Indian party's voluntary dealing with the tribe. Thus, the holding *Allstate Indem. Co.* should not be read to disqualify insurance policies from being valid consensual commercial activities taking place on tribal lands. It can be safely relied upon that an insurance policy is a contract where the insurance company provides a service to the insured and if that policy covers a tangible object then the lawsuit arises where that object was harmed.

In our facts, the dispute is directly related to the Lexington policy providing insurance coverage to the Lucky Eagle Casino. The language of Lexington's policy states that "[i]n the event of a failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States" placing a payment dispute directly within the scope of the contract. Lexington is a non-member party who entered into a consensual commercial contract to provide the Lucky Eagle Casino, a tribal entity, a service on tribal land. The policy fits within the type of commercial dealing that *Montana's* consensual relationship exception was intended to include. The

Tribe 's lawsuit arises directly from a disagreement over the insurance policy, thus satisfying the necessary tribal contacts of *Strate*.

II. CONCLUSION

The insurance policy between Lexington and the Tribe is a contract placing the interactions between these two parties squarely in the consensual relationship exception of *Montana.* As a result, there is a colorable claim under tribal jurisdiction for which the Chehalis Tribal Court retains the right of exhaustion and comity.

Based on the findings that there was a deliberate and knowing contract between Lexington and the Confederated Tribes of the Chehalis Reservation at the time of the dispute, insuring tribal property located within the borders of the Chehalis Indian Reservation and on lands held in trust status for the benefit of the Tribe and its members, the Court finds valid

ORDERED THIS 21st DAY OF APRIL, 2010.

/s/ Ron J Whitener
Ron J. Whitener – Judge

APPENDIX B

Joint Statement of Undisputed Facts and Genuine Disputes

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
1	Joint	The Cabazon Band of Cahuilla Indians (the "Tribe") is a federally recognized Native American Tribe.	Stipulated to by all parties	Undisputed	Undisputed
2	Joint	The Tribe is the beneficial owner of the Cabazon Indian Reservation near Indio, California, the lands of which Reservation are held in trust for the Tribe by the United States.	Stipulated to by all parties	Undisputed	Undisputed
3	Joint	The Tribe owns and operates the Fantasy Springs Resort, located within the Cabazon Indian Reservation.	Stipulated to by all parties	Undisputed	Undisputed
4	Joint	The Tribe is insured through a nationwide property insurance program known as the Tribal Property Insurance Program ("TPIP")	Stipulated to by all parties	Undisputed	Undisputed
5	Joint	TPIP is part of a larger property insurance program known as the Alliant Property Insurance Program (APIP)	Stipulated to by all parties	Undisputed	Undisputed
6	Joint	APIP also insures municipalities, hospitals, and non-profit organizations	Stipulated to by all parties	Undisputed	Undisputed
7	Joint	Various insurance companies participate in APIP (and its subprogram TPIP) by providing insurance and underwriting services at different layers of coverage and varying percentages of risk insured by those layers.	Stipulated to by all parties	Undisputed	Undisputed
8	Joint	Lexington Insurance Company is one of the insurance companies that participate in APIP and TPIP	Stipulated to by all parties	Undisputed	Undisputed
9	Joint	Lexington is not a member of the Tribe	Stipulated to by all parties	Undisputed	Undisputed

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
10	Joint	TPIP is maintained and administered by a third-party service called "Tribal First," a trade name used by Alliant Insurance Services, Inc.	Stipulated to by all parties	Undisputed	Undisputed
11	Joint	TPIP is a specialized program of Alliant Underwriting Solutions and/or Alliant Insurance Services, Inc. ("Alliant")	Stipulated to by all parties	Undisputed	Undisputed
12	Joint	Alliant Underwriting Solutions and/or Alliant Insurance Services, Inc. are California corporations located in California	Stipulated to by all parties	Undisputed	Undisputed
13	Joint	Alliant is not a member of the Tribe	Stipulated to by all parties	Undisputed	Undisputed
14	Joint	The Tribe bought multiple property insurance policies issued by Lexington under TPIP (hereinafter the "Lexington Policies")	Stipulated to by all parties	Undisputed	Undisputed
15	Joint	The Lexington Policies relevant to this action were for the policy period from July 1, 2019 to July 1, 2020	Stipulated to by all parties	Undisputed	Undisputed
16	Joint	The Tribe obtained the Lexington Policies not directly from Lexington, but through Alliant	Stipulated to by all parties	Undisputed	Undisputed
17	Joint	The Tribe obtained the Lexington Policies based on underwriting guidelines established between Alliant and Lexington	Stipulated to by all parties	Undisputed	Undisputed
18	Joint	Lexington itself negotiated and entered into separate contracts with Alliant and/or brokers setting forth Lexington's obligations under TPIP	Stipulated to by all parties	Undisputed	Undisputed

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
19	Joint	Lexington did not have direct contact with the Tribe before the issuance of the Lexington Policies to the Tribe	Stipulated to by all parties	Undisputed	Undisputed
20	Joint	Lexington learned of potential TPIP insureds only through Alliant	Stipulated to by all parties	Undisputed	Undisputed
21	Joint	Lexington learned of the Tribe as a potential TPIP insured through Alliant	Stipulated to by all parties	Undisputed	Undisputed
22	Joint	Alliant (not Lexington) processed the Tribe's submissions for insurance	Stipulated to by all parties	Undisputed	Undisputed
23	Joint	Alliant (not Lexington) collected premiums from the Tribe and remitted them to Lexington	Stipulated to by all parties	Undisputed	Undisputed
24	Joint	Alliant (not Lexington) prepared and provided quotes, cover notes, policy documentation, and evidences of insurance to the Tribe	Stipulated to by all parties	Undisputed	Undisputed
25	Joint	Alliant (not Lexington) developed and maintained an underwriting file for the Tribe	Stipulated to by all parties	Undisputed	Undisputed
26	Joint	Each Lexington Policy provided through TPIP to the Tribe for the 2019-2020 policy period incorporates a master policy form that sets forth the terms, conditions, and exclusions of coverage applicable to the Tribe (the "Master Policy")	Stipulated to by all parties	Undisputed	Undisputed
27	Joint	The Master Policy's "Service of Suit (U.S.A.)" provision states in full "It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Named Insured (or Rein-	Stipulated to by all parties	Undisputed	Undisputed

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
		sured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or any State in the United States. It is further agreed that service of process in such suit may be made upon: FLWA Service Corp. c/o Foley and Lardner LLP, 555 California Street, Suite 1700, San Francisco, CA 94194-1520 (applicable to all markets except as noted below) and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal. The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Named Insured (or Reinsured) to give a written undertaking to the Named Insured (or Reinsured) that they will enter a general appearance upon Underwriters' behalf in the event			

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
		such a suit shall be instituted. Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefore. Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted on behalf of the Named Insured (or Reinsured) or any beneficiary hereunder arising out of this contract of insurance (or reinsurance), and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof."			
28	Joint	The Lexington Policies do not contain a choice-of-law provision	Stipulated to by all parties	Undisputed	Undisputed
29	Joint	The Master Policy does not specifically name any TPIP insured, including the Tribe	Stipulated to by all parties	Undisputed	Undisputed
30	Joint	The Master Policy does not specifically name any TPIP insurer, including Lexington	Stipulated to by all parties	Undisputed	Undisputed
31	Joint	The Master Policy states that the "Named Insured" is "shown on the Declaration page, or as listed in the Declaration Schedule Addendum attached to this policy"	Stipulated to by all parties	Undisputed	Undisputed

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
32	Joint	The Master Policy states that Tribal First maintains a "named Insured Schedule" in its files	Stipulated to by all parties	Undisputed	Undisputed
33	Joint	Copies of the Master Policy and other related documents were prepared by Alliant (not Lexington)	Stipulated to by all parties	Undisputed	Undisputed
34	Joint	Copies of the Master Policy and other related documents were provided to the Tribe by Alliant (not Lexington)	Stipulated to by all parties	Undisputed	Undisputed
35	Joint	Included among those documents prepared and provided by Alliant were declaration pages associated with the Lexington property insurance policies issued to the Tribe	Stipulated to by all parties	Undisputed	Undisputed
36	Joint	In each of those declaration pages, the "Named Insured" is identified as "All Entities listed as Named Insureds on file with Alliant Insurance Services, Inc.," whereas Lexington is identified as the Insurer, with "Administrative Offices" located at "99 High Street, Boston, MA 02110-2310."	Stipulated to by all parties	Undisputed	Undisputed
37	Joint	The "Mailing Address of Insured" is identified as the one "on file with Alliant Insurance Services, Inc." in "Thousand Oaks, CA"	Stipulated to by all parties	Undisputed	Undisputed
38	Joint	The Tribe also received documents entitled "Tribal Property Insurance Program Evidence of Coverage"	Stipulated to by all parties	Undisputed	Undisputed
39	Joint	The "Evidence of Coverage" documents are printed on "Tribal First Alliant Underwriting Solutions" letterhead	Stipulated to by all parties	Undisputed	Undisputed

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
40	Joint	The "Evidence of Coverage" documents are signed by Ray Corbett, Senior Vice President of Alliant Specialty Insurance Services	Stipulated to by all parties	Undisputed	Undisputed
41	Joint	The "Evidence of Coverage" documents were prepared by Alliant	Stipulated to by all parties	Undisputed	Undisputed
42	Joint	The "Evidence of Coverage" documents were prepared "based on facts and representations supplied to [Alliant] by [the Tribe]"	Stipulated to by all parties	Undisputed	Undisputed
43	Joint	The "Evidence of Coverage" documents indicate any "Notification of Claims" must be sent to "Tribal First" in San Diego, California	Stipulated to by all parties	Undisputed	Undisputed
44	Joint	In March 2020, the Tribe temporarily suspended some of their business operations because of the COVID-19 pandemic.	Stipulated to by all parties	Undisputed	Undisputed
45	Joint	In March 2020, the Tribe submitted its insurance claim for business interruption losses under the Policy to Tribal First. The claim was submitted by Jonathan Rosser, the Tribe's Staff Attorney/Acting Director of Legal Affairs.	Stipulated to by all parties	Undisputed	Undisputed
46	Joint	In March 2020, Alliant sent the Tribe's insurance claim to Lexington/AIG Claims, Inc.	Stipulated to by all parties	Undisputed	Undisputed
47	Joint	Crawford & Company is Lexington's claims adjustor	Stipulated to by all parties	Undisputed	Undisputed
48	Joint	In March and April 2020, Crawford & Company conducted an investigation into the Tribe's insurance claim	Stipulated to by all parties	Undisputed	Undisputed

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
49	Joint	In April 2020, Lexington issued a letter to the Tribe denying coverage. The decision to deny coverage was made by Lexington, not Alliant, Crawford, or any other party	Stipulated to by all parties	Undisputed	Undisputed
50	Joint	Lexington's letter denying coverage was sent by or on behalf of Lexington from outside the territorial boundaries of the Tribe, on non-Reservation and non-tribal land. The letter was sent to the attention of Jonathan Rosser, the Tribe's Staff Attorney/ Acting Director of Legal Affairs, to "84-25 Indio Springs Pkwy, Indio, CA 92203," which is an address located on the Reservation	Stipulated to by all parties	Undisputed	Undisputed
51	Joint	No employee of Lexington has physically entered the Reservation at any time	Stipulated to by all parties	Undisputed	Undisputed
52	Joint	On November 24, 2020, the Tribe sued Lexington in the Cabazon Reservation Court	Stipulated to by all parties	Undisputed	Undisputed
53	Joint	The Tribe claimed that Lexington breached the contract and the implied covenant of good faith and fair dealing, and sought a declaration that their COVID-19-related financial losses were covered under the Lexington Policies.	Stipulated to by all parties	Undisputed	Undisputed
54	Joint	Defendant Martin A. Mueller presides over the Tribal Court action.	Stipulated to by all parties	Undisputed	Undisputed
55	Joint	Chief Judge Welmas oversees the administration of the Tribal Court	Stipulated to by all parties	Undisputed	Undisputed
56	Joint	In January 2021, Lexington made a limited special appearance and moved	Stipulated to by all parties	Undisputed	Undisputed

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
		to dismiss the Tribal Court action for lack of subject matter and personal jurisdiction under both Cabazon tribal law and federal law			
57	Joint	In March 2021, after full briefing and oral argument, Judge Mueller denied Lexington's motion to dismiss for lack of subject matter and personal jurisdiction	Stipulated to by all parties	Undisputed	Undisputed
58	Joint	In April 2021, Lexington timely noticed its appeal of the Tribal Court's order denying Lexington's motion	Stipulated to by all parties	Undisputed	Undisputed
59	Joint	In May 2021, Lexington's appeal was accepted for review by the Cabazon Reservation Court of Appeals	Stipulated to by all parties	Undisputed	Undisputed
60	Joint	In November 2021, after full briefing and oral argument, the three-judge panel of the Tribal Court of Appeals affirmed the Tribal Court's order	Stipulated to by all parties	Undisputed	Undisputed
61	Joint	In January 2022, Lexington filed an answer to avoid default	Stipulated to by all parties	Undisputed	Undisputed
62	Joint	The Tribal Court action remains ongoing, and the Tribal Court continues to assert jurisdiction over Lexington	Stipulated to by all parties	Undisputed	Undisputed
63	Joint	The employees of Lexington who were involved in underwriting, approving, and issuing the Lexington Policies did so from their respective places of business, which are not located on or within the Reservation or tribal land	Stipulated to by all parties	Undisputed	Undisputed
64	Joint	The employees of Lexington who were involved in reviewing, considering, determining, and denying coverage to	Stipulated to by all parties	Undisputed	Undisputed

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
		the Tribe in connection with the Lexington Policies and the Tribe's claims did so from their respective places of business, which are not located on or within the Reservation or tribal land.			
65	Joint	In buying insurance coverage, the Tribe never dealt directly with Lexington	Stipulated to by all parties	Undisputed	Undisputed
66	Joint	Lexington contracted with Alliant or other brokers, also non-members, to join TPIP, in which the Tribe participates	Stipulated to by all parties	Undisputed	Undisputed
67	Joint	In its dealings with Alliant or these brokers in connection with the issuance of the Lexington Policies, Lexington did not enter the Tribe's land and did not execute any documents on the Tribe's land	Stipulated to by all parties	Undisputed	Undisputed
68	Joint	In its dealings with Alliant or these brokers in connection with the issuance of the Lexington Policies, Lexington did not interact directly with the Tribe	Stipulated to by all parties	Undisputed	Undisputed
69	Joint	The Tribe does not generally regulate the insurance industry	Stipulated to by all parties	Undisputed	Undisputed
70	Joint	As a component of its tribal government, the Cabazon Band of Cahuilla Indians operates a tribal court system composed of a trial court and an appellate court.	Stipulated to by all parties	Undisputed	Undisputed
71	Joint	Under the Lexington Policies, Lexington was the insurer and the Tribe was the insured	Stipulated to by all parties	Undisputed	Undisputed

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
72	Joint	Under the Lexington Policies, Lexington (and not Alliant or Tribal First) is required to provide coverage to the Tribe when the relevant terms, conditions, limitations, and exclusions of coverage have been satisfied under the Master Policy and any relevant endorsement.	Stipulated to by all parties	Undisputed	Undisputed
73	Joint	Subject to their terms, conditions, limitations, and exclusions of coverage, the Lexington Policies insure property owned by the Tribe, including the Fantasy Springs Resort Casino and other property on its Reservation, and insure against "all risk of direct physical loss or damage" to property	Stipulated to by all parties	Undisputed	Undisputed
74	Joint	The Tribe's claim for which it sought coverage from Lexington was based on losses allegedly suffered by a Tribe-owned business located on the Reservation	Stipulated to by all parties	Undisputed	Undisputed
75	Joint	The TPIP evidence of coverage document identifies the Tribe as the insured and identifies "Lexington Insurance Company and Additional A Rated and Non Admitted Carriers" as the insurers	Stipulated to by all parties	Undisputed	Undisputed
76	Joint	Lexington issued the Lexington Policies through TPIP to the Tribe, which provide coverage for property owned by the Tribe including property located on the Tribe's Reservation subject to the policies' terms, conditions, limitations, and exclusions of coverage	Stipulated to by all parties	Undisputed	Undisputed

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
77	Defendants	Annually over the last decade, an Alliant employee would visit the Cabazon Reservation to meet with Tribal employees to gather information relevant to the renewal of the Tribe's policies with Lexington.	Joint Exh at 2-3, ¶ 7 (Rosser Decl.)	Disputed **Immaterial. Fed. R. Evid. 401.** Whether "an Alliant employee would visit the Cabazon Reservation" is of no "consequence in determining" the jurisdictional question at issue in the parties' cross-motions, *id.*, because Lexington, not Alliant, is being subjected to tribal jurisdiction in the underlying tribal court action for conduct related to Lexington's determination and denial of coverage to the Tribe, not for the issuance of renewal of the Lexington Policies.	This fact is relevant because Alliant made these trips to the Reservation as Lexington's agent/ representative, which strengthens the argument of the exercise of personal jurisdiction over Lexington. *See, e.g.*, *Daimler AG v. Baruman*, 571 U.S. 117, 135 n.13 (2014) ("Agency relationships, we have recognized, may be relevant to the existence of specific jurisdiction.")
78	Defendants	The revenues derived from the Tribally-owned businesses on the Reservation, including Fantasy Springs Resort Casino, are vital sources used to support the Tribe's essential services to tribal members and persons visiting and doing business on the Reservation.	Joint Exh at 2, ¶ 5 (Rosser Decl.)	Disputed. **Immaterial. Fed. R. Evid. 401.** Whether the "revenues derived from the Tribally-owned businesses on the Reservation are vital sources used to support the Tribe's essential ser-	

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
				vices" is of no "consequence in determining" the jurisdictional question at issue, *id.*, because the Tribe has not asserted the second *Montana* exception as a basis for jurisdiction, nor was the second *Montana* exception a basis for jurisdiction analyzed or determined by the Tribal Court of Appeals. In any event, mere financial loss does not meet the particularly "elevated threshold" required for *Montana's* second exception. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 331 (2008), *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Circ. 2015).	

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
79	Defendants	The Tribe's decision to suspend operations of its on-Reservation businesses, including Fantasy Springs Resort Casino, resulted in the loss of use of those facilities and cost the Tribe millions of dollars in lost business revenues	Joint Exh at 3, ¶ 8 (Rosser Decl.)	Disputed. **Immaterial. Fed. R. Evid. 401.** Whether the "Tribe's decision to suspend operations of its on-Reservation businesses resulted in the loss of use of those facilities and cost the Tribe millions of dollars in lost business revenues" is of no "con-sequence in determining" the jurisdictional question at issue, *id.*, because the Tribe has not asserted the second *Montana* exception as a basis for jurisdiction, nor was the second *Montana* exception for jurisdiction analyzed or determined by the Tribal Court of Appeals. In any event, mere financial loss does not mee the particularly "elevated threshold" required for *Montana's* second exception. *Plains Commerce Bank v. Long Family Land &*	

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
				Cattle Co., 554 U.S. 316, 331 (2008), *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Circ. 2015).	
80	Defendants	When a tribal court litigant is a non-Indian, such as Lexington, the Tribe retains a pro tem judge who has no affiliation or any commercial dealings with the Tribe or any of its departments to preside over the proceedings. The aim is both to provide an entirely impartial forum and to avoid even the appearance of bias.	Joint Exh at 2, ¶ 4 (Rosser Decl.)	Disputed **Immaterial. Fed. R. Evid. 401.** Whether the "Tribe retains a pro tem judge who has no affiliation or any commercial dealings with the Tribe" is of no "consequence in determining" the jurisdictional question at issue, *id.*, because it is undisputed that "the Tribal Court continues to assert jurisdiction over Lexington" Joint Stmt. No 62. As such, this makes Defendant Martin A. Myeller, the judge pro tem who presides over the underlying tribal court action against Lexington, "properly subject to suit for declaratory and injunctive relief"	

No.	Proponent	Statement of Fact	Supporting Evidence	Opponent's Response	Proponent's Reply
				Kodiak Oil & Gas (USA) Inc. v. Burr, 932 F.3d 1125, 1132 (8th Cir 2019).	
81	Defendants	The Tribe paid $594,492 in premiums for the TPIP for policy year 2019-2020	Joint Exh at 2, ¶ 6 (Rosser Decl.)	Disputed. **Immaterial. Fed. R. Evid. 401.** Whether the "Tribe paid $594,492 in premiums for the TPIP for policy year 2019-2020" is of no "consequence in determining" the jurisdictional question at issue, *id.*, because whether the Tribe performed under the contract goes to the merits of the Tribe's breach of contract claims in the underlying tribal court action, which is not being litigated in this action.	

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 5:22-cv-00015—JWH-KK

LEXINGTON INSURANCE COMPANY, A DELAWARE CORPORATION,

Plaintiff,

v.

MARTIN A. MUELLER, IN HIS OFFICIAL CAPACITY AS JUDGE FOR THE CABAZON RESERVATION COURT; DOUG WELMAS, IN HIS OFFICIAL CAPACITY AS CHIEF JUDGE OF THE CABAZON RESERVATION COURT,

Defendants.

DECLARATION OF JONATHAN ROSSER IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Hearing Date: July 29, 2022
Hearing Time: 9:00 AM
Hon. John W. Holcomb

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I, Jonathan Rosser, declare as follows:

1. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would testify competently to the matters contained herein.

2. Since 2016, I have served as the Staff Attorney/Acting Director of Legal Affairs for the Cabazon Band of Cahuilla Indians. Prior to that, I served as Staff Attorney for the Cabazon Band beginning in 2013.

3. Among my duties in my current position, I function as the administrator of the Cabazon Reservation Court. The Reservation Court functions

as an element of tribal government and operates under Title 9 of the Cabazon Tribal Code. Attached hereto as **Exhibit 1** is a true and correct copy of Title 9, as amended.

4. The Cabazon Reservation Court is comprised of a trial court and, when empaneled, a court of appeals. It has long been the practice of the Court that when a tribal court litigant is a non-Indian, the Court retains a *pro tem* judge who has no affiliation or any commercial dealings with the Tribe or any of its departments to preside over the proceedings. The aim is both to provide an entirely impartial forum and to avoid even the appearance of bias.

5. The Tribe operates several businesses on its Reservation, including Fantasy Springs Resort Casino. The revenues derived from these businesses, especially the Casino. are vital sources used to support the Tribe's essential services to tribal members and persons visiting and doing business on the Reservation

6. For years, the Tribe has been insured by the Lexington Insurance Company for damage or loss to its property on its Reservation, including the Fantasy Springs Resort Casino. The Tribe paid $594,492 in premiums for the policy year 2019-2020.

7. The Lexington policy is administered by Alliant Insurance Services, Inc. ("Alliant"). Over the years, my principal contact at Alliant has been Donald Molloy. Since I started working for the Tribe in 2013, Mr. Molloy would personally visit the Cabazon Reservation to meet with me and sometimes other Tribal employees to gather information relevant to the renewal of the Tribe's policies with Lexington.

8. In 2020, due to the COVID-19 pandemic, the Tribe temporarily suspended operations of its on-Reservation businesses, including Fantasy Springs Resort Casino. That decision resulted in the loss of use of those facilities and cost the Tribe millions of dollars in lost business revenues.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 2nd day of June, 2022 at the Cabazon Indian Reservation.

/s/ Jonathan Rosser
Jonathan Rosser